[J-148-2012] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 655 CAP
Appellee	:	Appeal from the Order of the Indiana County Court of Common Pleas, Criminal Division, at No. CP-32-CR-0000218-1997, dated March 19, 2012
v.	:	
RONALD LEE WEISS,	:	
Appellant	:	SUBMITTED: November 20, 2012

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: October 31, 2013**

I join the Majority Opinion, with the exception of the resolution of appellant's Brady[1] claim respecting Commonwealth witnesses Wright and Tribuiani. In arguing Brady materiality, appellant advocates for an expansion of Brady that would place his own trial testimony – inconsistent and implausible, and deemed "incredible" by the PCRA[2] court – off limits from analysis. He argues for this expansion of Brady because, he guesses that if he had been provided the impeachment evidence regarding Mr. Wright and Mr. Tribuiani, his trial counsel could have effectively used the evidence by persuading appellant not to take the stand and harm his cause through what amounted

[1] Brady v. Maryland, 373 U.S. 83 (1963).

[2] Post-Conviction Relief Act, 42 Pa.C.S. § 9541 *et seq*.

to perjury. According to appellant, Brady materiality must be evaluated by the speculative use that the defense possibly may have made of undisclosed evidence, and if the defendant claims he would not have testified, then the court later assessing Brady materiality cannot look to his trial testimony when assessing the fairness of the proceeding.

The Majority assumes the legitimacy of this theory "arguendo" and then rejects the claim, premised upon examination of a diminished trial record minus appellant's testimony. The Majority thus offers no view on the novel expansion appellant poses. I have no objection to dispositions premised upon an assumed point of law, if that is the more efficient manner of assessing a claim and the approach is unlikely to be mischaracterized and abused in future cases. But, in my view, the proper way to analyze appellant's claim of Brady materiality is to squarely address his assertion that the current law dictated by the U.S. Supreme Court commands that a PCRA petitioner pursuing a Brady claim is entitled to shield himself from his own trial testimony. I think this is particularly the case where, as here, the Brady claim is premised upon a misrepresentation of governing decisional law of the U.S. Supreme Court. Thus, I would reduce the Majority's "arguendo" analysis to a secondary holding.

The Brady analysis argued by appellant is erroneous for several reasons. First, the U.S. Supreme Court has never embraced his interpretation. Indeed, appellant's claim to the contrary is premised upon a mischaracterization of United States v. Bagley, 473 U.S. 667 (1985). Appellant states the following proposition as if it were black-letter law: "The proper Brady inquiry asks what 'course that the defense and the trial would have taken had the defense not been misled' and what impact the misconduct had on 'the preparation or presentation of the defendant's case.' Bagley, 473 U.S. at 683." Brief of Appellant, 25. From his assertion that mere effects upon defense preparation,

rather than hard evidence, is the measure of Brady materiality, appellant argues his more radical extended rule that he may shield himself from his own prior testimony.

However, Bagley supports neither appellant's "defense effects" root rule, nor his testimonial immunity extension of the rule. Appellant's counsel – lawyers employed by the Philadelphia-based Federal Community Defender Office ("FCDO") -- neglect to note that the Bagley language they cite and quote as governing black-letter law in fact represented the views of only two Justices in Bagley. It is not governing law. I examined and explained the non-precedential effect of this language at some length in my concurring opinion in Commonwealth v. Willis, 46 A.3d 648 (Pa. 2012), a direct appeal case. See id. at 674-84 (Castille, C.J., concurring, joined by Eakin and McCaffery, JJ.) (addressing Court's erroneous apprehension of Brady materiality in Commonwealth v. Green, 640 A.2d 1242, 1245 (Pa. 1994)).[3]

Moreover, nothing in the logic of Brady materiality suggests a design to shield a defendant from his prior testimony or perjury. The test for Brady materiality is the same as the test for Strickland[4] prejudice: whether there is a reasonable probability that the outcome of the proceeding would have been different. See Kyles v. Whitley, 514 U.S. 419, 433-35 (U.S. 1995) (noting that Bagley adopted Strickland formulation for Brady claims). The test, whether for Brady or Strickland, looks to the proceeding that actually

[3] In Willis, I wrote because the lead opinion there, representing the views of two of six participating Justices, failed to squarely recognize that Green had misapprehended Bagley and federal law to the extent that it declared – as appellant here erroneously declares – that Brady materiality is measured by mere effects upon defense preparation, rather than hard evidence. Id. at 676 ("This key proposition of federal law is the sole product of the Green Court; it is erroneously stated as if it is the settled command of the High Court; and it cannot be squared with then-extant authority from the High Court.").

[4] Strickland v. Washington, 466 U.S. 668 (1984).

occurred and attempts to assess its underlying fairness. See id. at 451; see also Bagley, 473 U.S. at 678. The High Court has never held that courts, charged with assessing Brady materiality by re-examining the trial that occurred in light of previously suppressed evidence, are obliged to diminish the record at that trial. Accordingly, appellant's theory is a non-starter. The expansion, if there is to be one, should come from the High Court.

Second and relatedly, this is a PCRA appeal. An assessment of the fairness of appellant's trial – whether he poses a Brady claim, a Strickland claim, or any other claim – is not measured by minority views in prior decisions or by hopeful predictions of where federal decisional law might someday go; it is measured by the existing law that governs. The only federal decisional law that governs in Pennsylvania is that commanded by the U.S. Supreme Court. Even assuming that the PCRA authorized present-day collateral relief premised upon predictions of developing federal doctrine – in fact, it does not – it would be unwise to undo final state convictions on such speculative grounds. The PCRA already specifically allows for relief premised upon new constitutional rulings from this Court or the U.S. Supreme Court, once a new rule has already been announced and held to have retroactive effect. See 42 Pa.C.S. § 9545(b)(1)(iii). Given that construct, there is no reason – or authority – to indulge speculative predictions about the future course of the law. Errors in such predictions are subject to correction only by the U.S. Supreme Court, which accepts a handful of cases from state courts in any given term, and has no particular incentive to correct erroneous predictions in state collateral appeals. And, errors in such predictions favoring the defense run the risk of arbitrarily releasing murderers.

Third, even if appellant's new rule were someday accepted, the mere assertion of his PCRA counsel that appellant would not have testified and perjured himself obviously would not be enough to prove that fact, and no measure of "arguendo" reasoning relieves appellant of his burden to support his PCRA claims factually on appeal. Appellant would have to support his claim through his own testimony and that of his trial counsel, and the PCRA judge would have to make an assessment of whether appellant would not have testified, if only he had known of impeachment evidence. Given appellant's headstrong, controlling performance at trial, it is not particularly likely that his current counsel's speculations have any basis in fact.

Finally, I believe it is extremely unlikely that the U.S. Supreme Court would adopt a Brady materiality extension, such as that posed by appellant, which would immunize a defendant against the effects of his own trial testimony, much less his own false trial testimony. To borrow from the Strickland jurisprudence from which Brady materiality derives:

> It is true that while the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as Strickland itself explained, there are a few situations in which prejudice may be presumed.... And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. Nix v. Whiteside, 475 U.S. 157, 175-176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).
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> Similarly, in [Lockhart v. Fretwell, 506 U.S. 364 (1993)], we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in Strickland…. Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law

> entitled him, we held that his claim did not satisfy the "prejudice" component of the Strickland test.

Williams v. Taylor, 529 U.S. 362, 391-93 (2000) (citations and footnotes omitted). Cf. Commonwealth v. Cox, 863 A.2d 536, 556-57 (Pa. 2004) (Castille, J., concurring) (strong argument to be made that heightened prejudice standard under Lockhart should be applied to ineffectiveness claims with "fundamental substantive issues that would have to be resolved in defendant's favor before relief could be granted"); United States v. Day, 285 F.3d 1167, 1171 (9th Cir. 2002) ("Because a defendant does not have a 'right' to commit perjury without suffering the consequences, the fact that counsel's ineffectiveness gave [defendant] an opportunity to commit perjury does not constitute deprivation of a right; accordingly, this portion of the sentence does not satisfy the prejudice component of Strickland."). Again, in explicating both Brady and Strickland, the High Court has stressed the overriding concern of whether the defendant has received a fair trial. Fairness works two ways, the High Court teaches. When the defendant takes the stand and elects to testify, and then testifies absurdly or untruthfully, I doubt that the U.S. Supreme Court would hold that Brady requires courts to pretend that his testimony never existed.

The PCRA court rejected appellant's claim in part because his own testimony was so obviously false that it doomed him. Appellant now seeks to avoid the effect of his testimony in a case where the inquiry is required to focus on the fairness of his trial. For the reasons above, I would address his theory and hold that it is frivolous.